Supreme Court, U.S.
FILED
APR 12 2010
OFFICE OF THE CLERK

68 (1)

10-213

IN THE

Supreme Court of the United States

ARLENE D. ROWLAND,

Petitioner,

v.

PRUDENTIAL FINANCIAL, INC.,
WACHOVIA CORPORATION, et al,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

Arlene D. Rowland, *Plaintiff-Petitioner Pro Se*
P.O. Box 7591
Ventura, CA 93006
(no telephone)

FOUR QUESTIONS PRESENTED

1. Whether dismissal of employment claims of retaliation and discrimination, deemed barred by the statute of limitations because Petitioner allegedly was not employed by Defendants, rather than examining the discrete and related incidents of the "charge period," perpetuates *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) overturned by the Lilly Ledbetter Equal Pay Act of 2009, codified at 42 U.S.C. § 2000e-5(a) which states that an unlawful employment practice occurs, when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid. Congress provided retroactive application to May 28, 2007 for pending claims, including recovery of back pay for up to two years preceding the filing of the charge with the EEOC.

If so, would the continuing application of an interpretation overruled by Congress be a denial of Petitioner's due process guaranteed by the Fifth Amendment of the Constitution, and a denial of equal protection of Arizona State statutes prohibiting employment related retaliation and discrimination?

2. The Arizona District Court granted the employers' motions to dismiss timely reported EEOC Charges that Rowland timely filed in district court. Can an employee, or former employee, who files claims of retaliation, discrimination, and sexual harassment against an employer covered under Title VII and the ADA, be deemed time barred based solely on her status of not being employed by that specific employer on the date of the discrete violation when,

for example, *Burlington Northern & Santa Fe Railway v. White*, 126 S. Ct. 2405, 2414 (2006) held that the express anti-retaliation provision in Title VII, 42 U.S.C. 2000e-3(a), "extends beyond workplace-related or employment-related retaliatory acts and harm;" and *Robinson v. Shell Oil Company*, 117 S.Ct. 843 (1997) held that Title VII extends to former employees?

Sub-issue:

Does Rowland's status of not being employed with a specific employer on the specific date of the alleged violation also bar her claims under the Equal Pay Act, the Fair Labor Standards Act, the Family Medical Leave Act, and the Sarbanes Oxley Act of 2002, while she does in fact have the express statutory standing as either an employee, a former employee, or and "individual" covered under the Acts and timely filed claims against a covered employer, or an employee or agent of a covered employer? *For example*, the Equal Pay Act, a part of the Fair Labor Standards Act, has a two year statute of limitation and no pre-filing requirement, yet the district court decided that Rowland did "*not state a cognizable claim under FLSA. Instead, it appears to be another attempt at a Title VII gender based claim. As discussed above, such a claim is untimely.*" (Dismissal Order of July 2, 2007, Pg. 10-11, ¶5).

3. The district court, denied Plaintiff's **demand for a jury trial** of her employment claims, guaranteed by the United States Constitution, and the Arizona State Constitution, dismissing all of her

claims before the defendants ever filed "answers" to her complaint, and before admissible evidence was filed by any defendant with personal knowledge of the disputed facts to contradict Rowland's complaint allegations referencing her timely filed EEOC Charges and her complaints to other federal agencies, signed under penalty of perjury, and attached to her responses to defendants' motions to dismiss. Did it violate Rowland's federal and state constitutional rights to a jury trial, and her constitutional right of due process and uniform application of the law under the Fifth and Fourteenth Amendments when the judge, rather than a jury, decided the disputed and contradictory material facts of her privacy and employment claims, adopted defendants' counsels' self-serving opinions, unsupported by admissible evidence, and then presumed that her status as a "former employee" disqualified all claims, contrary to the unambiguous statute qualifying language as to "coverage," and "charge period?"

For one example, Rowland claimed that in 2004 Wachovia Corporation provided her an employee benefit plan, administered by Prudential Insurance Company, an entity of Prudential Financial, Inc., while she was employed by Wachovia Securities (a joint business venture of Prudential Financial, Inc. and Wachovia Corporation formed in July 2003), and that in a separate arbitration proceeding, Prudential Insurance Company released medical information, in her employee insurance file to Prudential Securities, Inc.'s counsel, defending her December 2002

employment claim of Title VII workplace discrimination, a month prior to service of disputed subpoenas which further lacked her signed authorization to release medical information, mandated by an Arizona statute. Then, just days after service of the subpoenas, while motions to quash remained pending, Prudential Insurance's medical consultant e-mailed a transcript of her medical information to a *"random woman"* who reported that she received Rowland's confidential medical and identifying information, just days before a scheduled arbitration of those same Title VII claims filed against Prudential Securities, Inc. The court decided *"arbitrators have the authority to issue subpoenas for the production of documents. Thus, the subpoena issued by NASD to PI-DMS is valid."* (July 2007 Order dismissing claims, Pg. 9, Lns. 26-28). *"It thus follows that when an alleged FCRA violation occurs in an arbitration proceeding, it is not a violation to comply with a subpoena for documents validly issued by the arbitrator(s)." "Accordingly, the Court will dismiss Plaintiff's Sixth Claim."* (*Id.* Pg. 10, Lns. 4-5). And, *"Plaintiff alleges that Defendants violated §521 of the GLBA. The GLBA, however, does not provide for a private cause of action ... these state law claims appear for first time in her Response to Movant's Motion to Dismiss. Such claims will not be considered by the Court as they were not alleged in the pleadings. Accordingly, the Court will dismiss Plaintiff's Seventh Claim."* (*Id.* Pg. 10, Lns. 13-22).

4. Did the court abuse its discretion and subject a former Arizona resident and employee to the unfair legal prejudice of a statutory residency bar, and time bar, by not retaining supplemental jurisdiction over her Arizona State statutory wage claim to an entitlement of treble damages and interest on wages Prudential paid late?

On July 2, 2007 when the district court dismissed Rowland's claims and ordered entry of judgment, it had discretion to retain supplemental jurisdiction over her Arizona State wage claim under A.R.S. § 23-355 for treble damages of a statutory right under A.R.S. § 23-351 to receive "all wages due" but underpaid to her from November 2002 through December 2003, within the meaning of "wages" as defined by A.R.S. § 23-350. This court claim was filed on October 26, 2004, while wages continued to be withheld. Prudential corrected the deficiencies and paid her $34,320.50 on January 7, 2005, so that the actual late payment adjustment was proof that she had been underpaid constituting a *per se* violation of A.R.S. § 23-351. Because Rowland permanently moved to California in September 2006, she was not a resident of Arizona on July 2, 2007 when the court dismissed her federal claims which presented a statutory bar to a nonresident, precluding the filing of a wage claim in an Arizona State court that may have been tolled for the time the district court had supplemental jurisdiction over the wage claim until it granted Prudential's April 14, 2005 motion (D.Dkt. 24) to dismiss claims twenty-six months later.

PARTIES TO THE PROCEEDING

Petitioner, Arlene D. Rowland, employed as a registered Financial Advisor at Prudential Securities, Inc. from April 1996 until Prudential Financial, Inc. transferred her to its new joint venture, Wachovia Securities in July 2003, was the plaintiff in the district court and appellant in the court of appeals.

Respondents Prudential Financial, Inc. and Wachovia Corporation were the corporate defendants, that formed a joint venture, Wachovia Securities, a registered broker-dealer, in July 2003, in the district court complaint and the first amended complaint, and were the appellees in the court of appeals.

The District Court denied Petitioner-Plaintiff Rowland's uncontested motion for leave to file a corrected and lodged Second Amended Complaint (May 6, 2005) (D.Dkt.40), after an attorney briefly appearing for her filed the amended complaint on April 11, 2005 (D.Dkt.20), and removed "Unknown Defendants" from the caption box and failed to list the additional defendants originally served the complaint and summons (Proof of Service filed at D.Dkts.16, 19):

Prudential Insurance Company of America;
Prudential Securities, Inc.;
Prudential Securities Group, Inc.;
Prudential Equity Group, Inc.;
Prudential Equity Group LLC;
Wachovia Securities, LLC;
Wachovia Securities Financial Network, LLC;
Wachovia Securities Financial Holdings, LLC;
Wachovia Prudential Financial Advisors, LLC;

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i. 1-5

PARTIES TO THE PROCEEDING..... ii.

TABLE OF CONTENTS..... iii.

TABLE OF CITED AUTHORITIES..... iv. 1-7

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS / ADMINISTRATIVE AGENCIES..... v. 1-3

BASIS FOR JURISDICTION..... v. 3-4

CONCISE STATEMENT OF THE CASE.....1

Background Facts.....2

Complaint Related to Dec. 27, 2002 EEOC Charge.....3

Complaint Related to July 6, 2004 EEOC Charge.....6

Complaint Related to Nov. 30, 2004 EEOC Charge.....9

Summary of Basis for Dismissal of Court Claims.....10

I. STANDARD FOR DISMISSAL OF CLAIM....10

A. Defendants' Conclusory FRCP Rule 12(b) Motions to Dismiss, Conflict With Facts of Plaintiff's Sworn Statements, Verified Statement of Claim.....11

B. Summary Judgment Dismissal Unsupported. Defendants Admitted No Evidence.....15

II. CLAIMS MET THE STATUTE OF LIMITATIONS FILING REQUIREMENT OF TITLE VII, THE ADA, ARIZONA CIVIL RIGHTS ACT, ARIZONA WAGE/LABOR LAW 16

A. "Lilly Ledbetter Fair Pay Act of 2009" Reinforced Claim Accrual Date.....18

B. Unlawful Employment Practices Occurring During the Charge Filing Period Were Not Time Barred Because the Employer's Termination Date Does Not Freeze the Liability Accrual Date.....23

1. Second EEOC Charge of July 6, 2004 Timely Filed in Court - October 2004.....23

2. Third EEOC Charge of November 30, 2004 Timely Filed in Court by Complaint Amendment on April 11, 2005.....25

C. Similar or Related Unlawful Employment Practices Time-Barred by the Court Qualify as Unlawful Employment Practices Relating to Those Occurring During a Charge Filing Period.....25

1. First EEOC Charge of December 27, 2002 Timely Filed for NASD Arbitration - February 2003.....25

D. Doctrines of Equitable Tolling, Judicial Estoppel, and "Unclean Hands" Precludes Statute of Limitation Defense to Avoid Timely EEOC Charge Under Employer's Mandatory Mediation Policy to - "Suspend Proceedings Until the Program is Utilized.....27

III. EMPLOYMENT RELATIONSHIP EXISTED WITHIN THE MEANING OF TITLE VII CLAIMS & ARIZONA CIVIL RIGHTS ACT, WAGE STATUTES.....30

IV. ROWLAND HAS A PRIVATE RIGHT OF ACTION UNDER SARBANES OXLEY ACT AND TIMELY FILED: 18 U.S.C. § 1514A.....34

V. RELATIONSHIP OF THE EQUAL PAY ACT/ FAIR LABOR STANDARDS ACT (EPA/FLSA) TO TITLE VII.....37

VI. FAMILY MEDICAL LEAVE ACT (FMLA) "FORMER EMPLOYEE".....39

VII. CONCLUSION.....41

APPENDIX..... vi.

Opinions

MEMORANDUM (NO. 07-16358) *affirm*. 1/11/2010....vi.1 1-4

Court Clerk's "Notice of Appeal" 7/23/07 ..... vi.2 5-7

Judgment 7/2/2007 (CV04-2287PHX-EHC)..... vi.3 8

Dismissal Order 7/2/2007 (CV04-2287PHX-EHC)....vi.4 9-24

Order: dismissing Wachovia Corp. 4/27/06..... 25-31

Administrative Agencies

EEOC Charge #350A300777 12/27/02 32-36
EEOC Notice of Right to Sue: 1/8/03 37

EEOC Charge #350-2004-04353 - 7/6/04 38-56
EEOC Notice of Suit Rights - 7/30/04 57-59

EEOC Charge #350-2005-00893 11/30/04 60-62
EEOC Notice of Suit Rights dated: 1/7/05 63-64

EEOC Charge #350-2005-3211 5/10/05 65-68
EEOC Notice of Right to Sue: 6/8/05 69-70

U.S. Department of Labor:

OFCCP Complaint of Retaliation, Discrimination,
SOX violations - 7/9/2004 71-74
U.S. DOL 7/13/04 referred to EEOC under "MOU"
EEOC PHX Legal on November 18, 2004 75

Complaint No. I00120905 of retaliation, discrimin.,
SOX violations - 9/2/2004 76-79
U.S. DOL Letter 9/14/2004 - referred to EEOC..... 80

OSHA Sarbanes Oxley Act Complaint 12/3/2004
U.S. DOL-OSHA Letter 12/16/2004.....81

OSHA Regional Office Letter 12/17/2004 (Ricci).....82
Federal Trade Comm. #4726887 Resp. 7/21/04 83

TABLE OF CITED AUTHORITIES

Aldabe v. Aldabe, 616 F.2d 1089, (9th Cir.1980).....34

Anderson v. Liberty Lobby, 477 U.S. 242(1986).....11

Anderson v Reno, 190 F.3d 930(9th.Cir.1999).....19

Assoc. of Mexican-American Educators v. California, 231 F.3d 572 (9th.Cir.2000).....32

Baker v. McNeil Island Corrections Center, 859 F.2d 124 (9th Cir.(Wash.)1988).....15

Barnett v. Centoni, 31 F.3d 813 (9th Cir. (Cal.)1994) (*per curium*).....10

Barrilleaux v. Thayer Lodging Group, Inc., 601 F.2d 601 (E.D. La.1999).....40

Bates v Pacific Maritime Ass'n, 744 F2d 705 (9th.Cir.1984).....32

Bazemore v. Friday, 478 U.S. 385(1986).....19

Bouman v. Block 940 F2d 1211, 1220(9th.Cir.1991)...19

Bretz v. Kelman, 773 F.2d 1026 (9th.Cir.1985)(*en banc*).....15

Brock v. Richardson, 812 F.2d 121(3rd.Cir.1987).....39

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), 118 S. Ct. 2257.....32

Burlington Northern & Santa Fe Railway Company v. White, 126 S. Ct. 2405(2006).....17

Canada v. Blain's Helicopters, Inc., 831 F.2d 920, (9th Cir. Mont.)1987).....15

City of Tucson v. Clear Channel Outdoor, Inc., 209 Ariz. 544, 105 P.3d 1163 (2005).....28

Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, (C.A. 9 (Cal.) 1988).....27

Diaz v. Ft. Wayne Foundry Corp., 131 F.3d 711 7th.Cir.1997).....39

EEOC v. Comm. Office Prod. Co., 486 U.S. 107 (1988).....27

First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253 (1968).....16

Galdamez v. Potter, 415 F.3d 1015 (9th.Cir.2005).....33

Gumataotao v. Director of Dep't. of Revenue & Taxation, 236 F.3d 1077(9th Cir.(Guam)2001).....10

Hal Roach Studios, Inc. v. Richard Feiner, 896 F.2d 1542 (9th.Cir.1990).....16

Lædbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).....21, 22

Læw v. Kona Hospital., 754 F.2d 1420, (9th Cir.(Hawaii) 1985).....15

Lopez v. Smith,
203 F.3d 1122 (9th Cir. (Cal.) 2000)(*en banc*).....11

Louisiana-Pacific Corp. v. ASARCO, Inc.,
24 F.3d 1565 (9th.Cir.1994).....19

Lutcher v. Musicians Union Local 47,
633 F.2d 880 (9th Cir. (Cal.) (1980).....15

Murphey v. Valenzuela, 386 P. 2d 78 Ariz., 1963.....28

National R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002).....19, 24

Orr v. Bank of America, NT & SA, 285 F.3d 764,
(9th Cir. (Cal.) 2002).....11

Parrino v. FHP, Inc., 146 F.3d 699.....11
(9th Cir. (Cal.)1998), *Superseded by Statute as Stated in Abrego v. The Dow Chemical Co.*,
443 F.3d 676 (9th Cir.(Cal.) 2006)

Passantino v. Johnson & Johnson,
242 F.3d. 1015 (9th.Cir.2000).....12

Rankin v. Seagate Techs., Inc.,
246 F.3d 1145, 1148 (8th.Cir.2001).....39

Rea v. Martin Marietta Corp.,
29 F.3d 1450 (10th.Cir.1994).....39

Robinson v. Shell Oil Company,
117 S. Ct. 843 (1997).....33

Savage v. Glendale Union High School, Dist. No. 205, Maricopa County, 343 F. 3d 1036, (9th Cir.(Ariz.) 2003) *cert. denied* 541 U.S. 1009(2004) 34

Schroeder v. McDonald, 55 F.3d 454, (9th Cir. (Hawaii) 1995).....15

Serapion v. Martinez, 119 F.3d 982, (1st Cir.(P.R.) 1997) *cert. denied*, 118 S. Ct. 690 (1998).....32

Shea v. Rice, 409 F.3d 448 (D.C.Cir.2005).....22

Simms v. Oklahoma ex rel. Dept. of Mental Health and Substance Abuse Services, 165 F.3d 1321, (10th Cir. (Okla.)1999).....29

Smith v. Bell South Tele., Inc., 273 F.3d 1303(11th. Cir.)..40

Smith v. Dutra Trucking Co., 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd mem.* 580 F.2d 1054 (9th Cir. 1978).....33

Stone v. Duke Energy Corp., 432 F.3d 320, ...35 (4th Cir. (N.C.)(2005)(case below U.S. Dept. of Labor 2003-SOX-12)

Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc., 711 F.2d 138 (9th Cir. (Cal.)1983).....11

Valenzuela v. Kraft, Inc., 801 F. 2d 1170 (9th Cir. 1986).....28

Young v. United States, 535 U.S. 43 (2002).....28

Zipes v. Trans World Airlines, 455 U.S. 385(1982).....29

Constitutional Provisions, Statutes and Rules

Title VII of the Civil Rights Act of 1964, *as amended by* Civil Rights Act of 1991, Pub. L. No. 102-166

42 U.S.C. § 2000e *et seq. et seq.*12, 15, 16, 22, 24, 28
42 U.S.C. § 2000e-(1).....31, (fn.#9)
42 U.S.C. § 2000e-(1)(a).....34, (fn.#13)
42 U.S.C. § 2000e-(1)(b).....43, (fn.#13)
42 U.S.C. § 2000e-(1)(f).....31, (fn.#9)
42 U.S.C. § 2000e-(1)(n).....32, (fn.#11)
42 U.S.C. § 2000e-2(a).....33-34, (fn.#12)
42 U.S.C. § 2000e-3(a).....31, (fn.#10)
42 U.S.C. § 2000e-5(a).....32
42 U.S.C. § 2000e-5(b)... .....14, (fn.#2)
42 U.S.C. § 2000e-5(e)(3)(A)....18, 20, 23, 18, (fn#4)
42 U.S.C. § 2000e-5(e)(3)(B).....20,(fn.#5)
42 U.S.C. § 2000e-5(f)(1).....24, (fn.#7)
42 U.S.C. § 2000e-5(f)(3).....12, (fn.#1)

Lilly Ledbetter Fair Pay Act of 2009
amending Title VII, ADA Pub. L. 111-2 (S 181) (Jan. 29, 2009) "*taking effect as if enacted May 28, 2007*" for "all claims of discrimination in compensation pending on or after that date."
42 U.S.C. § 2000e-5(e)(3)(A, B) ...18, 21, 22, (fn.#6)

Equal Pay Act (EPA).....31, 37, 38

29 U.S.C. §§ 203, 206(d).....31, 37, 39

Fair Labor Standards Act of 1938 (FLSA)
as amended 1974.....38, 39
29 U.S.C. § 215(a)(3) 33
29 C.F.R. §§ 1601, 1604, 1614.....37
29 U.S.C.A.§ 255.....37, 38

Family Medical Leave Act of 1993 (FMLA)

29 U.S.C.A. §§ 2601 *et seq.* 39, 40
29 C.F.R. § 825.....39

Fair Credit Reporting Act (FCRA).....13, 30
as amended by FACTA 15 U.S.C. §1681
Gramm-Leach Blily Act (GLBA).....13, 30
15 U.S.C. § 6801

Sarbanes-Oxley Act of 2002 (SOX) Section 806
Pub.L.No. 107-205 806(a)
18 U.S.C. § 1514A(b).....34, 35, 36, 37 (fn.#14, 15)
29 C.F.R. § 1980.....36, (fn.#16)
68 Fed. Reg. 31859, May 28, 2003
68 Fed. Reg. 31860, May 28, 2003
69 Fed. Reg. 52113, Aug. 24, 2004

Americans with Disabilities Act of 1990 (ADA)
amended by Lilly Ledbetter Fair Pay Act of 2009

42 U.S.C. § 12111 *et seq*.....2, 6,22, 24, 31 (fn.#6)
42 U.S.C. § 12203 33
28 C.F.R. § 36, remedies & procedures of Title VII

U.S. Const., Art. III.....1
U.S. Const., 5th Amendment.....1
U.S. Const., 7th Amendment (Jury Trial).....1, 17
U.S. Const., 14th Amendment.....i
28 U.S.C. 1404, 1406.....(fn.#1)12
28 U.S.C. 1981a.....(fn.#5)20
Fed. R. Civ. P. 12(b)(6).....10, 11, 15
Fed. R. Civ. P. 19(a).....12, 13
Fed. R. Civ. P. 15(a), (c).....29
Fed. R. Civ. P. 56(e)).....16,(fn.#3)

Arizona Civil Rights Act
A.R.S. § 41-1481,1492.....16, 24, 28, 30 (fn.#8)
Arizona Employee Protection Act
A.R.S.§23-1501*et seq.*
A.R.S. §§ 23-350, 23-351, 355.....16, 17
A.R.S. § 20-2113, 36-661-664.....14

A.R.S. § 12-541.....17

Arizona Constitution

Art. 2, §23- "The right of trial by jury shall remain inviolate."

Art. 2, §4 - "No person shall be deprived of life, liberty, or property without due process of law."

Art. 2, §11- "Justice in all cases shall be administrated openly, and without unnecessary delay."

Art. 2, §8 - Right to Privacy- "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Art. 18, §3 "It shall be unlawful for any person, company, association, or corporation to require of its servants or employees as a condition of their employment, or otherwise, any contract or agreement whereby such person, company, association, or corporation shall be released or discharged from liability or responsibility on account of personal injuries which may be received by such servants or employees while in the service or employment of such person, company, association, corporation, or the agents or employees thereof; and any such contract or agreement if made, shall be null and void."

CONSTITUTION PROVISIONS, TREATIES, STATUTES AND REGULATIONS - VERBATIM

Pertinent text of cited statutes are set out verbatim in footnotes on the same page as cited in the Petition.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

Rowland v. Prudential Financial, Inc.,
Slip Copy, 2010 WL 76439, (Not Selected for publication in the Federal Reporter), C.A.9 (Ariz.), January 11, 2010 (NO. 07-16358) MEMORANDUM affirming.

Rowland v. Prudential Financial, Inc.,
Not Reported in F.Supp.2d, 2007 WL 1893630, D.Ariz., July 02, 2007 (NO. CV04-2287PHX-EHC); Dismissal.

Notice of Appeal filed: July 23, 2007 (D.Dkt.145)
Clerk's Judgment filed: July 2, 2007 (D.Dkt.144)
Order: dismissing claims: July 2, 2007 (D.Dkt.143)
Order denying Pla.'s 3rd Correct Amended Complaint December 14, 2006 (D.Dkt.109)
Order: denying Pla.'s 2nd Correct Amended Complaint September 14, 2006 (D.Dkt.105)
Transcript of April 24, 2006 Status Hearing (D.Dkt.89)
Order: dismissing Wachovia Corporation: April 28, 2006 (D.Dkt.83)
Amended Complaint filed April 11, 2005 (D.Dkt.20)
Complaint filed: October 26, 2004 (D.Dkt.1)

EEOC Charge #350-2004-04353 filed: July 6, 2004
EEOC Notice of Suit Rights dated: July 30, 2004
Arizona Notice of Right to Sue dated October 14, 2004

EEOC Charge #350-2005-00893: November 30, 2004
EEOC Notice of Suit Rights dated: January 7, 2005
Arizona Notice of Right to Sue: May 31, 2005

EEOC Charge #350-2005-3211 filed May 10, 2005
EEOC Notice of Right to Sue: June 8, 2005
Arizona Notice of Right to Sue: January 23, 2006

EEOC Charge #540-2006-02124 filed May 15, 2006
EEOC Notice of Right to Sue: September 6, 2006
Arizona Notice of Right to Sue: March 16, 2007

EEOC Charge #350A300777 December 27, 2002
EEOC Notice of Right to Sue: January 8, 2003
Arizona Civil Rights Division letter: January 10, 2003

National Association of Securities Dealers Dispute Resolution, Inc. NASD Case No. 03-00179
Uniform Submission Agreement to Arbitrate EEOC Charge of December 27, 2002 signed February 6, 2003
NASD Statement of Claim filed: February 2003
NASD granted Plaintiff's motion for dismissal without prejudice for consolidation with federal court claims on June 17, 2005; NASD "Award" issued April 21, 2006; Court "stay" lifted April 28, 2006 (D.Dkt.83)
** (NASD *now known as* FINRA) **

U.S. Department of Labor - (Executive Order 11246, Section 503 of the Rehabilitation Act of 1973) OFCCP Complaint of Retaliation, Discrimination, SOX violations - filed July 9, 2004; U.S. DOL Letter of July 13, 2004 - referred to EEOC under "MOU;" received by EEOC PHX Legal on November 18, 2004.

U.S. Department of Labor (Executive Order 11246,

Section 503 of the Rehabilitation Act of 1973) OFCCP Complaint No. I00120905 of retaliation, discrimination, SOX violations - filed September 2, 2004; U.S. DOL Letter of Sept. 14, 2004 - referred to EEOC, MOU.

U.S. Department of Labor, OSHA Sarbanes Oxley Act Complaint filed December 3, 2004; U.S. DOL-OSHA Letter of Acknowledgement dated December 16, 2004; DOL-OSHA Regional Office Letter of December 17, 2004 (Ricci - Regional Supervisor - Investigator).

STATEMENT OF BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 2101(c) because Appellant petitions within ninety days under 28 U.S.C. § 2106 to have the Supreme Court reverse the entry of the final "Memorandum" disposition of the Ninth Circuit Court of Appeals Case No. 07-16358 (*Arlene D. Rowland v. Prudential Financial, Inc., Wachovia Corporation, et al*) filed by the clerk on **January 11, 2010**, affirming Arizona District Court's final decision and judgment of **July 2, 2007** dismissing all claims of Case No. CV '04-02287-1-PHX-EHC, which was timely appealed on **July 23, 2007** to the Ninth Circuit, within thirty days under 28 U.S.C. § 2107(a), 28 U.S.C. § 1291, and 42 U.S.C. § 2000e-5(j). This is a petition for reversal of the district court dismissal of all claims and direction for further proceedings before a jury trial on the merits of Plaintiff's employment discrimination, sexual harassment, retaliation, privacy and wage claims filed in the Arizona District Court on October 26, 2004, with amendment.

JURISDICTION (continued)

The Arizona District Court had original jurisdiction of the this civil rights action arising under the Constitution and United States laws, 28 U.S.C. § 1331; and Acts of Congress regulating commerce, 28 U.S.C. § 1337; and Acts of Congress providing for protection of civil rights under 28 U.S.C. § 1343 with respect to deprivation of rights, privileges, and immunities secured by the Constitution and federal laws, and 42 U.S.C. § 2000e-5(f)(3) of Title VII. The District Court also had supplemental jurisdiction under 28 U.S.C. § 1367 and Article III of the United States Constitution because Petitioner exhausted required administrative remedies; and the Arizona State claims form part of the same case and controversy of employment related discrimination, sexual harassment, retaliation, and privacy violations.

CONCISE STATEMENT OF THE CASE

The Ninth Circuit Court of Appeals affirmation of the Arizona District Court's orders and final judgment dismissing all of Arlene D. Rowland's privacy and employment discrimination, sexual harassment and retaliation claims dramatically conflicts with well established United States Supreme Court decisions, prior Ninth Circuit decisions, and statutory language of Acts of Congress that set forth filing predicates, statutes of limitations, and requirements for standing. The District Court, and the Ninth Circuit's "processing" of this Pro Se employment civil rights claim grossly deviates from the accepted and usual course of judicial proceedings, as to call for an exercise of the United States Supreme Court's supervisory power of a case that the defendants have opportunistically caused to linger in federal court for five and a half years, while its subject business entities dissolve or reorganize, without ever a hearing on the merits.

.

A jury trial demand was denied, defense counsel's opinions were adopted as facts, and the court granted the employer's Federal Rules of Civil Procedure Rule 12(b) motions to dismiss all claims. The Fifth Amendment of the Constitution and the doctrine of *stare decisis* requires uniform application of the law. Here, the court shielded employers, their agents, and business entities from accountability for civil damages, and denied equitable relief and dismissing all claims based on immaterial employment dates, and Rowland's status as a "former employee." Both lower courts erroneously determined that she was employed by Prudential Equity Group, LLC ("PEG"), a firm that never employed her. Without statutory authority, the court limited the employer's and their agent's liability to the time that her

previous employer was registered as a broker-dealer to dismiss her claims as time barred. These decisions conflict with the statutory "charge period," reinforced by the Lilly Ledbetter Fair Pay Act of 2009, enacted by Congress to clarify statutory time limits and coverage of Title VII and the ADA.

The district court dismissed prior to discovery, and denied Plaintiff an evidentiary hearing motioned for by first dismissing an employer for lack of personal jurisdiction in April 2006. On July 2, 2007, the court dismissed claims deemed time barred contrary to unambiguous statute; then dismissed her remaining federal and state claims for failure to state a claim by arbitrarily deciding that a *former employee* could have no standing under the relevant statute; then dismissed her privacy claims which did not require any employment relationship; then dismissed claims the court deemed had no private right of action contrary to clear statutory language granting a private right of action; and finally dismissed the remaining defendant because no claims remained.

Background Facts

Rowland was hired by the Princeton, New Jersey office of Prudential Securities, Inc. (brokerage firm) as a financial advisor on April 15, 1996. She had graduated with a Bachelor of Science in Business Administration, with a 4.0 grade-point average ("A"), and ranked first in her graduating class. By October 2006, she was licensed to sell investments and securities in 19 states, was registered with the New York Stock Exchange ("NYSE"), the National Association of Securities Dealers ("NASD"), AMEX, and CBOE; and maintained Series 7, 63 and 65 professional investment licenses. She had a "clean" NASD CRD industry record, with no client

investment complaints, no statutory violations, and no regulatory violations.

Rowland received excellent performance reviews and qualified for the firm's advanced training, such as the "Masters Program;" "Investment Planning for Women" Certificate Program; the "Women's' Forum;" and the "Core Broker" Program; all supplemental career development training predicated on top performance. Compl.¶68.

Based on revenue production, assets under management, and her length of service, she was classified as a first quintile financial advisor, meaning that she was within the top 20% of all Series 7 licensed financial advisors nationwide; and she earned awards for exceeding firm goals, including a substantial amount of bonus deferred compensation. In January 1999 when her husband retired from his twenty-five year career in law enforcement with the Trenton, New Jersey Police Department, she transferred to the Scottsdale, Arizona branch office of PSI, because of his health. After the move, she retained nearly all of her clients' accounts. Am.Compl.¶19.

Prudential Financial, Inc. transferred substantially all of its PSI employees to Wachovia Securities on July 1, 2003, retaining 38% ownership, after it formed a joint business venture with Wachovia Corporation. Rowland remained employed with Wachovia Securities, LLC until she was terminated in October 2007 just days after she successfully completed a national regulatory continuing education program and passed the required licensing test. Am.Compl.¶7.

Complaint Related to December 27, 2002 EEOC Charge

On December 27, 2002, Rowland filed the first of

a series of discrimination, sexual harassment, and retaliation charges with the Equal Employment Opportunity Commission ("EEOC"), the Arizona Civil Rights Division, and the United States Department of Labor ("DOL"), alleging unlawful workplace discrimination tolerated in the Scottsdale, Arizona branch office. The following summary description quotes her court complaint, as amended.

Rowland complained of "managers and their delegates withholding marketing opportunities, business funding and support, [managers] kept secret management and other promotional opportunities, withheld equitable distribution of client accounts, orphaned accounts with investable assets, withheld training and licensing opportunities; all while providing those opportunities to the young, male financial advisors." Am.Compl.¶20. "Rowland qualified for promotional opportunities that included monthly salaries, [but] was denied consideration for multiple managerial opportunities, while men with lesser qualifications were selected for those positions." Am.Compl.¶ 12.

She encountered "a hostile work environment tolerated by at least, local and regional managers despite her written and verbal complaints and notification, as well as complaints by other female brokers in the same Scottsdale branch office." Am.Compl.¶21. "Male brokers were 'entertained' after conference and/or seminar dinners, with firm or business-partner funding at "male-oriented clubs" of a sexually explicit nature, while Rowland and other females at the same out-of-town firm conferences had no alternate after dinner activities. On occasion, Rowland and other female broker attendees would specifically complain to the conference planner, yet no alternate

firm-funded activities were ever planned for the female brokers....such "entertainment" was paid for with expense accounts of mutual fund wholesalers of Prudential or....firms that have selling agreements with Prudential. Manager Zirbel openly tolerated workplace hostility and started each day by distributing his offensive newsletter....examples follow...."
Am.Compl.¶58 Exhibits-Newsletters:

> "Nice dye job you puke...so my advice to you is lose the Gretian Formula & get back on the golf course ..."(6/26/2002 comments with arrow to picture of Charles Schwab.)
>
> "Defending your honor against a succession of imbecilic character assassinations is at times a major pain in the ass." (9/4/2002; referring to EEO complaints made by branch employees.).
>
> "Karen's gone and I'm happy, Hey love, Hey love, Karen's gone. Yeh! No more whining & complaining. Yeh, No more violin playing ... Karen's gone and I'm happy..." 12/17/2001
>
> Illustration of men's underwear briefs with noticeable bulging...."Does this market make you feel like you lost your.....give you downside protection....Okay boys and girls, clear your calendar for this one. It ought to be juicy!" 8/7/2001.
>
> Illustration of Middle-Eastern men with turbans a month after the 9-11 tragedy: "Why is this guy so mad? #1 His squalor hut was just leveled by a cruise missile....#3 His copy of "Turban Monthly" was taken from his mail box." 10/10/2001.

"The discrimination and a hostile workplace caused Rowland's sales production ranking to drop to the third quintile, hindered her career advancement, and

caused emotional distress." Am.Compl.¶22. Rowland's W2 income at PSI in the year prior to her transferring to the Scottsdale branch office where she encountered the discriminatory and hostile work environment, was approximately $92,000. (Compl.¶68). "Beginning in 2000, other females in the branch office filed formal EEO complaints. Prudential Human Resources and Prudential's legal staff conducted interviews, investigations, and training sessions in the Scottsdale office. Donna Dorn of Human Resources interviewed Rowland. Subsequent to the interviews, Rowland and other females, were retaliated against..." Am.Compl.¶23.

Complaint Related to July 6, 2004 EEOC Charge

"On July 6, 2004, Rowland timely filed a second charge" with the EEOC (Am.Compl.¶2) and complained that "on April 7, 2004 an employee of [Prudential Insurance] printed out at least 29 pages of Rowland's medical information....date stamped April 7, 2004... purportedly to respond to a subpoena .... served on May 4, 2004....responded to on May 14, 2004." Am.Compl.¶24. "Rowland objected to releasing medical records....on February 27, 2004....May 5, 2004....yet [Prudential Equity Group] delivered the subpoenas despite her attorney's timely objections. Rowland never waived doctor-patient confidentiality. Rowland never signed a "Medical Authorization"....was promised that her medical information 'would not be shared by any other party including her employer' (Notated in [Prudential Insurance] phone log....by Laura Hannan on 1/27/03)." Am.Compl.¶25.

"On May 17, 2004, a partial transcript of Rowland's medical record information, was e-mailed to a random woman by [Prudential's medical consultant]. (Am.Compl.¶28). "When Rowland phoned on May 28,

2004 for the HIPAA contact address to inquire about disclosure of her medical records and to file a written privacy complaint....a [Prudential Insurance] employee told Rowland that she should not be calling since Rowland had an attorney and was suing....and disconnected Rowland's call." Am.Compl.¶29. "Defendants have unlawfully disclosed Rowland's communicable disease information, including HIV test results in violation of A.R.S. §§ 36-661-664." Am.Compl.¶88.

"Over many years, Rowland was able to create an automatic $22,000 recurring annual stream of revenue, in addition to revenue from commission sales from her previous sales work as a Financial advisor....[PSI] and [Wachovia Securities have not paid Rowland the recurring revenue since September 6, 2002." (Am.Compl.¶32). "Wachovia has not responded to one single written privacy or employment complaint made by Rowland and has in fact opened her mailed correspondence and then had the U.S. Postal Service return her mail marked undeliverable." Am.Compl.¶27.

On February 17, 2005 the new Scottsdale Branch Manager called Rowland and told her that he needed her office space and that he had made arrangements to have her office packed and inventoried [while she was on an approved unpaid medical leave of absence]. He asked Rowland if she would prefer to have him store her office items at the branch or have them delivered to her house. She...planned to return to work and requested that the items stay at the branch office...the inventory was incomplete, and missing every single item of evidence of her EEO claims." Am.Compl.¶34. The items were "delivered to her house, contrary to her elected option...."

"Rowland made written...requests on at least February 27, 2004, March 24, 2004, April 12, 2004, May 24, 2004, for assistance with return to work and possible accommodation with a new position within Prudential or Wachovia for which she qualifies by experience, education, and professional licenses...Her requests for accommodation have been ignored, yet [Prudential Insurance] wrote "It appears you originally went out of work due to work environment stressors and the information supports you should be capable of returning to your regular occupation perhaps with a different employer."" Am.Compl.¶35.

"By delaying and ignoring Rowland's requests for assistance in resolving the workplace issues and assistance with return to work, Defendants are interfering with Rowland's client relationships and effectively taking possession of her client 'book of business'...while Defendants realize approximately $200,000 annual revenue on assets under management based on Rowland's client relationships cultivated over many years." Am.Compl.¶¶36-37.

"Rowland was harassed and treated in an hostile manner by....Human Resources when she made inquires regarding the miscalculation of her wage benefit base...." and "Joe Tierney, Vice President of Benefits told Rowland that he reviewed her "Case" prior to returning a call. After a 22 month delay, and repeated requests for proper calculation of the previous payments, PI sent Rowland a letter....."We have calculated an underpayment of benefits in the amount of **$34,320.50** for the period November 6, 2002 through December 31, 2003"...."she filed an EEOC complaint just two months prior to the 'miscalculation.' " Am.Compl.¶38. Joe Tierney ... purposely withheld proper wage information forcing 'an unreasonable or bad faith wage dispute' in

violation of A.R.S. § 23-351. Am.Compl.¶63.

"Male broker dates of hire [were] misstated so as to give the appearance of more seniority, the Manager withheld clients' investment accounts from broker assignment and stockpiled these "asset" awards for his newly recruited male brokers, and approximately 30% of the brokerage client's assets to be distributed to Financial Advisor's control, using the HARP system were not accounted for, indicating a tracking system by-pass to minimize the detection of discriminatory practices. At least one newly hired male broker was credited with 2 years of false [PSI] revenue production statistics in reports, yet the broker was not employed by PSI during those two years according to the NASD licensing database." Am.Compl.¶40.

On March 25, 2004 "when she arrived home from the failed mediation there was a mailed cancellation notice of her employee benefit insurance plans (dental, vision, accident and life insurance for herself, her spouse, and a dependant).....retroactive to February 28, 2004." Compl.¶35. "Her spouse's cancellation notification indicated that [she] was "terminated." Compl.¶36.

Complaint Related to November 30, 2004 EEOC Charge

"On November 30, 2004, Rowland timely filed a third charge of discrimination and retaliation with the EEOC." Am.Compl.¶3. On September 30, 2004, Rowland received a form letter from Wachovia advising of a distribution of approximately 756 vested shares of a mutual fund valued at approximately $19,000 from an employee investment account that Rowland earned [as bonuses] while employed by PSI, for achieving and exceeding employment sales goals in previous years.....Rowland contacted [Wachovia Securities] to sell

the shares, requesting a check be mailed for the approximate $11,900 proceeds on the [market] settlement date. Typically an automated process, yet Rowland did not receive the funds for three weeks as [Wachovia Securities] employees kept telling her that her account had been closed and the check did not go out. The account was reportedly opened, then closed, then opened again, repeatedly, causing the $11,900 to remain at [Wachovia Securities]." Am.Compl.¶41.

Summary of Basis for Dismissal of Court Claims

Rowland filed her second EEOC Charge of July 2004 in Arizona District Court on October 26, 2004. She amended this court complaint with her third EEOC Charge of November 2004 on April 11, 2005. Her first EEOC Charge of December 2002 was submitted for private arbitration in February 2003 and prior to any hearing on the merits, it was dismissed without prejudice for consolidation with this court complaint under an arbitration provision entitling a complainant to protect rights and seek remedies in court, after PSI became a defunct business entity.

I. STANDARD FOR DISMISSAL OF CLAIM

The Ninth Circuit reviews de novo a district court's disposition of a motion to dismiss pursuant to Rule 12(b)(6). "In determining whether a complaint states a claim, all allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. A complaint may not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of claims which would entitle relief." ***Barnett v. Centoni***, 31 F.3d 813, 816(9th.Cir.1994)(*per curiam*); ***Gumataotao v. Dir. of Dep't of Revenue & Taxation***, 236 F.3d 1077, 1083(9th.Cir.2001)(district court may not

consider materials outside the complaint and the pleadings).

The court may consider materials properly submitted as part of the complaint, as well as "document[s] the authenticity of which [are] not contested, and upon which the plaintiff's complaint necessarily rel[y]," even if they are not attached to the complaint, ***Parrino v. FHP, Inc.***, 146 F.3d 699, 706(9th.Cir.1998).

"The court may not resolve contested factual issues where the facts are so entwined with facts central to the parties' claims and defenses, the court must deny the motion to dismiss because otherwise the jurisdictional motion would provide a means of allowing the court to decide the case on the merits without requiring the defendants to meet evidentiary standards of a motion for summary judgment;" ***Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*** 711 F.2d 138, 139(9th.Cir.1983). Thus, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." ***Anderson v. Liberty Lobby,*** 477 U.S. 242, 249(1986).

A court can consider only admissible evidence in ruling on a motion for summary judgment; ***Orr v. Bank of America***, 285 F.3d 764, 773(9th.Cir.2002). A verified complaint may be treated as an affidavit to oppose summary judgment to the extent it is 'based on personal knowledge' and 'sets forth specific facts admissible in evidence.' ***Lopez v. Smith***, 203 F.3d 1122, 1132(9th.Cir.2000)(*en banc*).

A. Defendants' Conclusory FRCP Rule 12(b) Motions to Dismiss Conflict With the Facts of Plaintiff's Admissible Evidence

Wachovia Corporation falsely instructed the court that there was no employment relationship and the court dismissed Wachovia for lack of personal jurisdiction,[1] while Title VII authorizes suit "in any judicial district in the State in which the unlawful employment practice is alleged to have been committed." 42 U.S.C. 2000e-5(f)(3); ***Passantino v. Johnson & Johnson,*** 242 F.3d. 1015(9th.Cir.2000)(venue is proper in both the forum where the employment decision is made and the forum in which that decision is implemented or its effects are felt). Rowland filed copies of her W2's, pay checks, employee benefit program mail, and a letter mailed from Wachovia that expressly stated that she was employed by "Wachovia Corporation." Without a defendant affidavit, Wachovia's counsel explained away Rowland's admissible evidence as mistaken mailings in their reply to her opposition to dismissal. Rowland later motioned to join Wachovia, producing new evidence. *"The Court's dismissal of Wachovia Corporation for lack of personal jurisdiction cannot be vacated with a Rule 19(a) motion*

---

[1] **42 U.S.C. § 2000e-5(f)(3)** "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 [of the United States Code], the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought. [Sec. 706].

for joinder." (Dism.Order-Pg. 5:8-9; Dkt.143).

The court further relied on defense counsel's unsupported motions, stating: "*Court will deny Plaintiff's Motion for Joinder (Dkt.118) of Prudential Securities, Inc., *** Prudential Equity Group, Inc., Prudential Equity Group, LLC, *** Prudential Insurance Company of America, Wachovia Securities LLC, *** and Thomas Zirbel, pursuant to Federal Rule of Civil Procedure 19(a)*" (Dism.Order-Pg.4:6-11) because "*Plaintiff has not demonstrated any grounds for joining these additional defendants.*" (*Id.* Pg.4:21-22).

The court made factual determinations as to the nature of her "intent" regarding her privacy violation claims and declared: "*When Plaintiff chose the NASD forum to arbitrate her claims, she voluntarily contracted to be subject to the NASD Code of Arbitration*" (Dism.Order-Pg.9:23-24) and "*arbitrators have the authority to issue subpoenas for the production of documents***the subpoena issued by NASD to PI-DMS is valid*" (*Id.* Pg.9:26-28) and "*dismissed Plaintiff's Sixth Claim" under the FCRA,* (*Id.* Pg.10:4-5). The court dismissed "*Plaintiff's Seventh Claim*" under the GLBA (*Id.* Pg.10:13-22), another privacy right of action enforceable under Arizona statute stating: "*Although Plaintiff asserts state law claims that provide a private right of action, she does not do this in the First Amended Complaint. Rather, these state law claims appear for [sic] first time in her Response to Movant's Motion to Dismiss.*" (*Id.*Pg.8:14). The Complaint asserted state law claims:

> "PI failed to safeguard the confidential and identifying information in Rowland's medical file in accordance with Federal privacy standards and established security standards

> and procedures, by contracting with a doctor who neglected to implement physical, electronic, and procedural safeguards while conducting a medical review in order to determine continued qualification for an employee insurance benefit. (A.R.S. §20-2113)." Am.Compl.¶28. "Defendants have unlawfully disclosed Rowland's communicable disease information, including HIV test results in violation of A.R.S. § 36-661-664." Am.Compl.¶66.

Rowland alleged in her Amended Complaint that she timely filed charges of unlawful employment discrimination, sexual harassment and retaliation with the EEOC and the U.S. DOL; and that she received the "Notice of Right to Sue" for each EEOC Charge and letters from the DOL. Am.Compl.¶¶1-4,17. Copies of EEOC Charges attached to her responsive opposition to the defendants' motions to dismiss were executed below a declaration that she "signed under penalty of perjury that the above is true and correct" in the presence of EEOC representatives in Phoenix, Arizona. The EEOC Charges[2] contain incident details and are admissible evidence, based on her personal knowledge. The 2003 NASD Statement of Claim to arbitrate her December 2002 EEOC Charge, signed under oath in February 2003, in the district court record is also admissible evidence. *Appendix:* EEOC Charges.

Notably, the **Party** Defendants of this case never filed any declarations or affidavits and a non-party

---

[2] "Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. **42 U.S.C. Sec. 2000e-5(b)** [Sec. 706 of Title VII].

attorney's self-serving affidavits attached to a motion to dismiss claims are inadmissible hearsay lacking personal knowledge of the allegations of Rowland's complaint, because "the affiant must be a person through whom the exhibits could be admitted into evidence." ***Canada v. Blain's Helicopters, Inc.***, 831 F.2d 920, 925(9th.Cir.1987). The court should "treat the opposing party's papers more indulgently than the moving party's papers." ***Lew v. Kona Hosp.***, 754 F.2d 1420, 1423(9th.Cir.1985). Where the plaintiff states that the facts in the complaint are true under the pains and penalties of perjury [***Schroeder v. McDonald***, 55 F.3d 454,460n.10(9th.Cir.1995)], or avers that they are "true and correct," [***Johnson***, 134 F.3d at 1399], the pleading is "verified." Here the district court granted defendants' unsupported motions to dismiss.

In ***Baker v. McNeil Island Corrections Center***, 859 F.2d 124,129 (9th.Cir.1988) defendant's motion for dismissal pursuant to Rule 12(b)(6) for failure to state a claim had an affidavit attached and the Ninth Circuit explained that the "Corrections Center is not entitled to summary judgment against a pro se litigant merely by attaching an affidavit to its motion. We have observed that courts are reluctant to grant summary judgment for defendants in Title VII cases where the proof is in the hands of the alleged wrongdoers." *citing* ***Lutcher v. Musician's Local 47***, 633 F.2d 880-883(9th.Cir.1980). "Review is limited to the contents of the complaint." *Id.* In civil rights cases, where petitioner is pro se, the court has an obligation to construe the pleadings liberally and to afford petitioner any benefit of the doubt. ***Bretz v. Kelman***, 773 F.2d 1026, 1027(9th.Cir.1985)(en banc).

B. SUMMARY JUDGMENT DISMISSAL UNSUPPORTED BY ADMISSIBLE EVIDENCE

For defendants' motions to dismiss to convert to summary judgment,[3] they had to provide "significant probative evidence tending to support" their allegations. ***First Nat'l Bank of Ariz. v. Cities Serv. Co.***, 391 U.S. 253(1968). Defendants failed to present any evidence to support their dismissal motions. Rule 56(e) of the Federal Rules of Civil Procedure requires that a proper foundation be laid for evidence considered on summary judgment. ***Hal Roach Studios, Inc. v. Richard Feiner***, 896 F.2d 1542, 1551(9th.Cir.1990).

II. CLAIMS MET THE STATUTE OF LIMITATIONS FILING REQUIREMENT OF TITLE VII & THE ADA, ARIZONA CIVIL RIGHTS ACT, ARIZONA WAGE STATUTE

The Ninth Circuit affirmed the district court's order stating:

> "Plaintiff filed discrimination and retaliation charges with the EEOC on July 6, 2004 and November 30, 2004. Plaintiff's employment with PSI, however, ended on July 1, 2003 when PSI ceased to exist as a legal entity. These charges were thus untimely filed with the EEOC as against Movants by more than two months." (Dism.Order-Pg.8:7-11). "... the Court will dismiss Plaintiff's First through Fourth Claims." (Pg. 9:2).
>
> "Plaintiff's Fifth claim arises from state law cause

---

[3] "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.Rule Civ.Proc. 56(c).

> of action...barred by the statute of limitations..... Plaintiff's claim under AEPA also fails because it is untimely. A plaintiff must file suit within one year after the cause of action accrues. (A.R.S. 12-541). Plaintiff's employment relationship with PEG terminated on July 1, 2003 and thus provides the last date a cause of action could have accrued against Movants. This action was filed in October 2004, approximately three months past the appropriate date." (*Id.* Pg. 9:11-16).

The Supreme Court held in ***Burlington Northern & Santa Fe Railway Company v. White***, 126 S. Ct. 2405(2006) that "[a]n employer can effectively retaliate against an employee" for exercising his or her protected rights "by taking actions not directly related to his employment or by causing him harm *outside* the workplace." *Id.* at 2412. The proper analysis is whether the employer's conduct "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," *Id.* at 2415. To warrant trial, plaintiff need only show that a jury could conclude that a reasonable employee in Rowland's shoes would have found the defendants' conduct sufficiently adverse that she well might have been dissuaded by such conduct from making or supporting a charge of discrimination.

There is no doubt that a reasonable employee could find such a combination of threats and actions taken by employers with the design of imposing both the economic harm of withholding wages earned while on an unpaid medical leave of absence, cancelling employee insurance benefits, charging her the **$1,800** mediator fee to mediate employment disputes otherwise guaranteed paid by her employer's benefit program, filing a lawsuit against her to collect **$137,795.82** that her past employer

spent to defend her EEO claims, all while their business partner refused her return-to-work; and the psychological and reputation harm from exposure of her extremely confidential medical record information is sufficient to dissuade her, or other employees, from making or supporting a charge of discrimination. Indeed, the courts have found lesser conduct to suffice under similar legal standards.

A. "LEDBETTER FAIR PAY ACT" REINFORCED CLAIM ACCRUAL DATE

Title VII makes it an "unlawful employment practice" to discriminate "against any individual with respect to his compensation***because of such individual's***sex." 42 U.S.C. § 2000e-2(a)(1). One instance in which an actionable unlawful employment practice occurs is "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid." 42 U.S.C. § 2000e-5(e)(3)(A).[4]

Under Title VII a claimant must file a charge of discrimination within 180 days "after the alleged unlawful employment practice occurred," unless the

---

[4] "For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when **an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid,** resulting in whole or in part from such a decision or other practice." 42 U.S.C.A. § 2000e-5(e)(3)(A).

"person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice," in which case the claimant has 300 days to file his charge with the EEOC. 42 U.S.C. § 2000e-5(e)(1). The EEOC and Arizona are parties to a work-sharing agreement, whereby a charge filed with the EEOC will automatically be deemed filed with the State. The charge will be deemed "initially instituted" with the state agency within the meaning of Title VII. ***Bouman v. Block*** 940 F2d 1211, 1220(9th.Cir.1991).

Generally, the statute of limitations begins to run when the plaintiff knew or should have known all of the essential elements of its applicable cause of action. ***Louisiana-Pacific Corp. v. ASARCO, Inc.***, 24 F.3d 1565, 1580(9th.Cir.1994). ***National R.R Passenger Corp. v. Morgan,*** 536 U.S. 101, 105(2002), considered "whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside the statutory time period." ***Morgan*** considered applicability of the continuing violation doctrine to discrete acts, specifically equal pay violations, by reaffirming the statement the Court made in ***Bazemore v. Friday,*** 478 U.S. 385(1986), that each discriminatory paycheck was a separate discriminatory act that could give rise to a Title VII action. Each discrete discriminatory act starts a new clock for filing charges alleging that act and must be filed within the 300-day time period after the discrete discriminatory act occurred. ***Morgan***, 536 U.S. at 112.

Under the continuing violation doctrine, if a plaintiff has filed a charge of discrimination "that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone." ***Anderson v***

Reno, 190 F.3d 930(9th.Cir.1999)(continuing violation when acts before limitations period were part of pattern of discrimination that also existed within limitations period).

Based on the continuing violation doctrine, Rowland's Title VII and ADA pay discrimination claims are timely as to the discrete discriminatory acts of the "charging period" dating back to March 2, 2002 (300 days before she filed her first EEOC Charge on December 27, 2002). Since the March 2002-December 2002 ("charging period") incidents are similar and related to "unlawful employment practices with regard to discrimination in compensation" occurring prior to the "charging period," PSI's liability accrues to December 27, 2000 and Rowland is entitled to relief that includes "recovery of back pay for up to two years preceding the filing of the charge" on December 2002. 42 U.S.C. § 2000e-5(3)(A).[5]

PSI's March 2003 withholding of correct wage data causing a miscalculation and underpayment of wages from November 2002 - December 2003 (adjusted and paid in January 2005), and Wachovia's failure to return her to work after an approved medical leave of absence, and Prudential Financial's withholding of a corporate-wide former-employee benefit of the

---

[5] **42 U.S.C. § 2000e-5(e)(3)(A)** "In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), **including recovery of back pay for up to two years** preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge."

mandatory "Roads to Resolution" yet requiring a March 2004 mediation which she had to pay the mediator approximately $1800, and Prudential's later bill for its defense costs of **$137,795.82** while the firm's written policy guarantees no such costs, and the lawsuit that Prudential filed to collect its unsubstantiated legal defense bill, all fall within the "charging periods" of her July 2004, November 2005, May 2006 EEOC Charges. and the defendants' failure to pay, respond, correct, waive, assist, and employ are "compensation decisions."

To determine the timeliness of Rowland's EEOC Charge and this lawsuit, the district court had to identify precisely the "unlawful employment practice" in the "charging period." Rowland's claims were timely filed because she continued to file Charges of ongoing discrete incidents of discriminatory treatment and retaliatory acts with the EEOC, and the defendants were served with written "notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)***within ten days thereafter" by the EEOC pursuant to 42 U.S.C.A. § 2000e-5(e)(1).

In ***Ledbetter v. Goodyear Tire & Rubber Co.***, 550 U.S. 618(2007), the Supreme Court held that a claimant alleging discrimination based on a pay-setting decision must file a charge with the EEOC within 180 days, or 300 days, after the discriminatory decision was made. The Court rejected the plaintiff's claim that she could recover based on a later paycheck she received that would have been larger had the prior discrimination not occurred. The Court ruled that the continuing effects of a past employment decision, which was adopted with discriminatory intent, do not transform a subsequent employment act, unaccompanied by discriminatory intent, into a present violation.

However, the Ledbetter decision prompted Congress to pass the "**Lilly Ledbetter Fair Pay Act of 2009**," [6] to restore the law that was in place prior to the ***Ledbetter*** decision. This Act amends Title VII of the Civil Rights Act of 1964***"to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes." PL 111-2(S-181), January 29, 2009.

The new statutory provision clearly governs Rowland's "discriminatory compensation" based claims, "or other practice" reported in her EEOC Charges. The district court stated that "*Plaintiff's employment relationship with PEG terminated on July 1, 2003*" and "*Plaintiff's employment with PSI, however, ended on July 1, 2003 when PSI ceased to exist as a legal entity,* " but that is not the basis for liability accrual, nor is it the basis for calculating the "charging period" of the discrete unlawful discriminatory compensation. ***Shea v. Rice***, 409 F.3d 448(D.C.Cir.2005)(Each week's paycheck that delivers less pay to a black employee than to a similarly situated white employee is a wrong actionable under Title VII, regardless of the fact that this pattern of paying less to the black employee was begun prior to the limitations period).

---

[6] "This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (**42 U.S.C. 2000e et seq.**), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), Title I and section 503 of the Americans with Disabilities Act of 1990, and sections 501 and 504 of the Rehabilitation Act of 1973, that are pending on or after that date." PL 111-2, 2009 S 181, § 6, Approved Jan. 29, 2009.

Court alleging in timely filing. Dkt.1-¶¶21-22. [7]

The "district court had supplemental jurisdiction over Arizona Civil Rights Act (ACRA) claim" because Rowland alleged the "same facts and circumstances that formed basis for" her Title VII and ADA claims "supported by her ACRA claim." ***Savage v. Glendale Un. H.S., Dist. No. 205, Maricopa County***, 353 F.3d 1036(9th.Cir.2003) cert. denied 541 U.S. 1009(2004). App.Br.Pg.7.

The discrete discriminatory employment actions and retaliation occurring in the "charging period" (300 days prior to July 7, 2004) were timely reported and timely filed in the district court. ***Morgan***, 536 U.S. at 113 (The existence of past discrete acts of discrimination for which no charge is filed with the EEOC, and the employee's prior knowledge of their occurrence, does not bar an employee from filing charges about related discrete acts, as long as these acts are independently

---

[7] 42 U.S.C. § 2000e-5(f)(1): "If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.'Sec.706

B. Unlawful Practices Occurring During the Charge Filing Period Were Not Time Barred - Employer's Termination Date Does Not Freeze the Liability Accrual Date

Congress modified Title VII and the ADA in 2009, because court decisions like the one made here "undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress." 42 **U.S.C.A. § 2000e-5(e)(3)(A).**

1. SECOND EEOC CHARGE OF JULY 6, 2004 TIMELY FILED IN DISTRICT COURT

On **July 6, 2004**, Rowland filed a sworn and signed second **EEOC Charge #350-2004-04353** alleging discrimination based on Sex, Retaliation, Age, Disability; Continuing Action" against Wachovia Corporation, Prudential Insurance Company, Wachovia Securities LLC, Prudential Equity Group LLC, Prudential Insurance Company of America Disability Management Services, attaching nine pages. [Dkt.47-Exh. Pgs.954-63-Resp. to Pru. Motion to Dismiss]. The specific acts of the charge were within 300 days of the discrete incidents. [Dkt.47-Pgs.965-74]. Rowland's July 2004 EEOC Charge was also attached to her opposition to Wachovia's Motion to Dismiss. Dkts.65-66; Ap.Br.Pg.3-6.

Arizona issued a Notice of Right to Sue on **October 14, 2004.** A.R.S. § 41-1481(D). Dkt.65-Pg.282. "The EEOC issued a Notice of Suit Rights on **July 30, 2004.** Dkt.46-Pgs.952-3; App.Br.Pg.6. On **October 26, 2004** Rowland timely filed this Complaint No. CV '04-02287-PHX-EHC (jury trial demand) in the District

discriminatory and charges addressing those acts are themselves timely filed).

2. THIRD EEOC CHARGE OF NOV. 30, 2004 TIMELY FILED IN DISTRICT COURT

On **November 30, 2004** Rowland filed a third **EEOC Charge#350-2005-00893** alleging "discrimination based on race, sex, retaliation, age, disability, other; continuing Action" against Wachovia Corporation, Prudential Financial, Inc. [alleged at Dkt.20-¶3; Am.Compl.; Dkt.65-Pg.285 Exh. of Dkt.38-Resp. to Wac. Motion to Dismiss][Dkt.47 Pg.977-Exh. of Dkt.45-Resp. to Pru. Motion to Dismiss]. App.Br.Pgs.8-9.

On **January 7, 2005**, EEOC issued a Notice of Suit Rights [Dkt.65-Pg.286; Dkt.47-Pg.975] and on **Monday, April 11, 2005,** within 90 days of receipt of the notice, Rowland filed an Amended Complaint adding the claims of this third EEOC Charge. Dkt.20.

C. SIMILAR OR RELATED UNLAWFUL PRACTICES TIME-BARRED BY THE COURT QUALIFY AS UNLAWFUL EMPLOYMENT PRACTICES RELATING TO THOSE OCCURRING DURING A CHARGE FILING PERIOD 42 U.S.C. § 2000e-5(e)(3)(B)

1. FIRST EEOC CHARGE OF DECEMBER 27, 2002 FILED FOR ARBITRATION WITH NASD

On **January 8, 2003** the EEOC issued a Notice of Right to Sue [Dkt.47-Exh.-Pg.942] for Rowland's **December 27, 2002** EEOC Charge #350A300777 [Pgs.943-948] alleging "Discrimination based on Sex, Retaliation; Continuing Action" against her employer Prudential Securities, Inc.; *alleged in* Compl.-Dkt.1

¶¶1,17 & Am.Compl.-Dkt.20-¶1; App.Br. Pgs.9-10. On **February 6, 2003**, Rowland signed a sworn and notarized Uniform Submission Agreement and Statement of Claim submitting her December 27, 2002 EEOC Charge to arbitration under the NASD Dispute Resolution, Inc. Dkt.1-¶18. On March 25, 2004 she participated in Prudential Financial, Inc.'s **required mediation** as set forth in the employee manual **ROADS TO RESOLUTION** a policy requiring employees to:

Compl.-Dkt.1-Exh.A:

> "exhaust mediation before you proceed to arbitration" (Pgs. 13,2) including "If you are terminated, any issues involving Prudential arising from your employment or the termination of your employment are subject to **Roads to Resolution**." "Prudential encourages all employees to use **Roads to Resolution**, if you do not exhaust Steps One through Three of the Program before proceeding to arbitration or filing a administrative complaint or lawsuit, it is Prudential's intent to ask the arbitrator, agency, or court to suspend the proceedings until the Program has been utilized." (Pgs.8,1)Ap.Br.Pg.15.

Rowland, was employed with Prudential Securities, Inc., a broker dealer and wholly owned subsidiary of Prudential Financial, Inc. from April 15, 1996 until July 1, 2003 [NASD Financial Advisor License CRD #2740470, Dkt.65-exh:0-1]; App.Br.Pg.12. Rowland and Prudential's counsel engaged in the mandatory employee complaint process as described in Prudential's **ROADS TO RESOLUTION** and she participated in the unsuccessful NASD mediation of her December 2002 EEOC Charge on **March 25, 2004**. Dkt.1-¶¶30-41. On **April 21, 2006**, prior to any hearing

on the merits, the NASD, Dispute Resolution, Inc. granted her motion and **dismissed without prejudice** her EEO Claim specifically so that she could consolidate the arbitration claims with her claims in court after PSI became a defunct business entity on July 1, 2003 and bulk transferred Rowland and substantially all of its employees to Wachovia Securities.

Rowland timely filed the December 2002 charge for mediation and arbitration with the NASD, Dispute Resolution, Inc., a securities broker-dealer industry self-regulatory organization authorized under the U.S. Securities and Exchange Commission to resolve disputes with broker-dealers and it had "authority to grant relief from the practice charged." ***Cohen v. Wedbush, Noble, Cooke, Inc.,*** 841 F.2d 282(9th.Cir.1988)(Congress has committed to the SEC the task of ensuring the rights established by the Securities Act are not compromised by inadequate arbitration procedures). ***EEOC v. Comm. Office Prod. Co.,*** 486 U.S. 107, 110-111(1988)(Section 706(e) of Title VII means that a complainant "who initially institutes proceedings with a state agency with authority to grant or seek relief from the practice charge" must "file a charge" with that agency, or "have the EEOC refer the charge to that agency...).

D. EQUITABLE TOLLING & ESTOPPEL PRECLUDES STATUTE OF LIMITATIONS DEFENSE TO AVOID EEOC CHARGE TIMELY FILED UNDER AN EMPLOYER'S MANDATORY MEDIATION POLICY TO - "SUSPEND PROCEEDINGS UNTIL THE PROGRAM IS UTILIZED"

An action is deemed commenced and the statute

of limitations tolled at the time the complaint is filed; ***Young v. United States***, 535 U.S. 43(2002). "In a Title VII suit, failure to file an EEOC charge within the prescribed 300-day period is not a jurisdictional bar, but is treated as a violation of a statute of limitations, complete with whatever defenses are available to such a violation, such as equitable tolling and estoppel;" ***Valenzuela v. Kraft, Inc.*** 801 F.2d 1170, 1174(9th.Cir.1986). *Argued at* Ap.Br.Pg.10-11. Rowland's December 2002 EEOC Charge should be equitably tolled for the time those claims were under the jurisdiction of the NASD, consistent with the EEOC's policy encouraging mediation and arbitration of EEOC charges, and Arizona State's express policy that filing of a "charge is also subject to conciliation or other means of settlement" [A.R.S. 41-1481(B)]. ***Young***, 535 U.S. at 49(it is "hornbook law" that limitations periods are tollable "unless tolling would be inconsistent with the text of the relevant statute"); ***City of Tucson v. Clear Ch. Outdoor***, 209 Ariz. 544, 105 P.3d 1163(2005)("a statute of limitations is tolled when a suit is commenced, and a suit is commenced by the filing of a complaint"); ***Murphey v. Valenzuela***, 386 P. 2d 78 Ariz., 1963(statute of limitation tolled by commencement of action).

The district court did not toll the time that Rowland's first EEOC Charge of December 2002 was pending in arbitration pre-hearing procedures, and stated:

> "Plaintiff received a Right to Sue letter for her First claim alleging sex discrimination and harassment under Title VII in January 2003. Plaintiff filed this claim on October 26, 2004. Plaintiffs First Claim is barred by the statute of limitations." (Dism.Order-Pg.7:8-11). "Plaintiff knew of her claim and waited to file them with the

Court until after the limitations period had expired" (*Id.* Pg. 8: 20-22).

Rowland is a *Pro Se* Plaintiff and foreclosing equitable tolling would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process;" ***Zipes v. Trans Work Airlines***, 455 U.S. 385, 397 (1982)(Title VII filing period is requirement subject to tolling when equity so requires). App.Br. Pg. 15. Also, certain amendments to a charge of discrimination may relate back to the filing date of the original charge of discrimination and, therefore, be considered timely even if the amended charge takes place after the limitations period; 29 C.F.R. 1601.12(b). ***Simms v. Oklahoma***, 165 F. 3d 1321, 1325(10th.Cir.1999). The courts have "a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements." ***Balistreri v. Pacifica Police Dep't***, 901 F.2d 696, 699 (9th.Cir.1990).

The district court unfairly granted Prudential a *contested* stay of this case (June 2005-April 2006), until the arbitration was dismissed without prejudice. Prudential should be estopped from taking the opposite litigation position of timely claims for arbitration purposes, but time barred only because the forum has changed. A statute of limitations is based on a policy that there is a point beyond which a prospective defendant should no longer need to worry about the possibility of commencement in the future of an action against him; not an employer's shield to avoid liability of EEOC charges timely filed, and noticed.

Prudential had a legal duty to refrain from filing for a stay in April 2005 and compelling arbitration, under the SEC rule voiding contracts of unlicensed broker-

dealers; and the NASD by-laws barring arbitration unless agreed to in writing once defunct; and the unavailability of NASD arbitration procedures two years past registration revocation. Prudential again came to court with unclean hands with a liability avoidance scheme after signing on **June 16, 2003** their "Uniform Submission Agreement" to arbitrate an employee's claims of discrimination, then dissolved her employer fourteen days later, on **June 30, 2003.**

III. EMPLOYMENT RELATIONSHIP EXISTED WITHIN THE MEANING OF TITLE VII CLAIMS & ARIZONA CIVIL RIGHTS ACT, WAGE STATUTES

The District Court's acceptance of, and the Ninth Circuit's affirmation of Defendant's repeated arguments of nonliability because Rowland is a former employee, not an employee, or an employee too long ago is contrary to the Civil Rights Acts.[8] The court dismissed some Complaint Counts not dependant on any type of employment relationship: FCRA as amended by FACTA, GLBA, privacy statutes, state insurance law.

An employer may not interfere with the protected

---

[8] **A.R.S. 41-1492.10** Prohibition against retaliation and coercion (A). No person may discriminate against any individual because the individual has opposed any act or practice made unlawful by this article or because the individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this article. (B). It is unlawful to coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of, for having exercised or enjoyed or on account of his having aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by this article.

right of an employee[9] to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding under **Title VII** of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a),[10] the Americans with Disabilities Act (**ADA**), 42 U.S.C. § 12101 *et seq.*, or the Equal Pay Act (**EPA**), 29 U.S.C. § 206(d). These employee rights are non-waivable under the civil rights laws. Interference with these protected rights is

---

[9] "The term "**employee**" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States." **42 U.S.C. § 2000e(f)**. [Sec. 701].

"The term "**complaining party**" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter." **42 U.S.C. § 2000e(1)**. [Sec. 701].

[10] "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." **42 U.S.C. § 2000e-3(a)**. [Sec. 704].

contrary to public policy and the anti-retaliation provisions of the civil rights statutes prohibit such conduct.

Employers are liable for the discriminatory acts of their "agents;" [11] 42 U.S.C. § 2000e(a)(Title VII); 42 U.S.C. § 12111(5)(A)(ADA)(defining "employer" as including any agent of the employer). When evaluating whether or not an employer is liable for the harassment of its employees by supervisors, the Supreme Court has adopted a vicarious liability standard. ***Burlington Indus. Inc., v. Ellerth***, 524 U.S. 742, 765(1998). The justification for heightened liability when supervisors are responsible for the creation of a hostile work place is that supervisors are able to use their position within an organization to bring the weight of the organization to bear on an employee. An employer is liable for harassment by a co-worker or **non-employer** if management knew or should have known of the misconduct; ***Assoc. of Mexican-American Educators v. California***, 231 F.3d 572, 584(9th.Cir.2000)(direct employment relationship not prerequisite to Title VII liability if defendant exercises sufficient power over individual's employment opportunities); ***Bates v Pacific Maritime Ass'n***, 744 F2d 705, 709 (9th.Cir.1984)(successor company liable for the predecessor company's legal obligations); ***Serapion v. Martinez***, 119 F.3d 982, 990(1st.Cir.1997), *cert. denied*, 118 S. Ct. 690 (1998)(individual who has an ownership

---

[11] "The term "**respondent**" means an employer, employment agency, labor organization, joint labor management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title." 42 U.S.C. § 2000e(n). [Sec. 701].

interest in an organization, receives compensation based on its profits, and participates in managing the organization would qualify as an "owner" or "partner."); ***Smith v. Dutra Trucking Co.***, 410 F.Supp. 513(N.D.Cal 1976), *aff'd mem.* 580 F.2d 1054(9th.Cir.1978)(Act proscribed the discriminatory interference with an employment opportunity by a third party who is not the individual's direct employer). ***Galdamez v. Potter***, 415 F.3d 1015, 1022 (9th.Cir.2005)(An employer may be held liable for the actionable third-party harassment of its employees where it ratifies or condones the conduct by failing to investigate and remedy it after learning of it).

Title VII bars discrimination not only in the "terms" and "conditions" of ongoing employment, but also in the "terms" and "conditions" under which individuals may *obtain* employment. In ***Robinson v. Shell Oil Company***, 117 S. Ct. 843 (1997), the Supreme Court held that §703 extends protection to **former employees**. Comparable anti-retaliation provisions appear at 29 U.S.C. § 215 (a)(3)(FPA) and 42 U.S.C. § 12203(a)-(b)(ADA). The terms "§701(b) employer" or "covered employer" refer to persons who meet the jurisdictional requirements set forth in §701(b) of the Act, regardless of whether they are the actual employer of the aggrieved party. Courts have interpreted the language of § 703(a)(1)[12] of Title VII to include situations

---

[12] "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's *race, color, religion, sex, or national origin*; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise

where a third party, who is a §701(b)[13] employer, has the ability to control or interfere with the employment opportunities of another employer and its employee.

IV. ROWLAND HAS A PRIVATE RIGHT OF ACTION UNDER SOX AND TIMELY FILED 18 U.S.C. § 1514A

The Ninth Circuit states "*Dismissal of Rowland's claims brought under SOX's criminal law statutes was proper because those statutes do not provide a private right of action.*" and cites ***Aldabe v. Aldabe***, 616 F.2d 1089, 1092 (9th.Cir.1980)(affirming dismissal of claims brought under criminal provisions that "provide[d] no basis for civil remedy). (MEMO Pg.3-¶2).

The Sarbanes-Oxley Act of 2002 ("SOX"),[14]

---

adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." **42 U.S.C. § 2000e-2(a)**.Sec. 703

[13] "The term **"employer"** means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year and any agent of such a person,****" **42 U.S.C. § 2000e(b)**. [Sec. 701]

"The term **"person"** includes one or more individuals, governments, government agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 [bankruptcy], or receivers." **42 U.S.C. § 2000e(a)**. [Sec. 701].

[14] **Section 806** "provides protection to employees against retaliation *** because the employee provided information to the employer or a federal agency or Congress relating to alleged

provides whistleblower protection and civil remedy by addition of §1514A to 18 U.S.C.A.; Pub.L.No. 107-205 806(a)).[15] For example, "Congress has indicated "a public policy in favor of whistleblowers in securities" and set aside confidentiality agreements entered into by former employees to permit disclosure relating to the pending litigation by employee under Section 806;" ***Stone v. Duke Energy Corp.***, 432 F.3d 320(4th.Cir. 2005)("Once a qualifying complainant files his complaint with a federal district court under section 1514A(b)(1)(B) of the SOX, jurisdiction vests in the district court and an ALJ no longer has jurisdiction).

The District Court states: *"Plaintiff's SOX claim fails as untimely." "Rowland's last date of employment with Prudential was July 1, 2003, which is the date of accrual for this cause of action. Rowland did not file her SOX charge with the DOL until July 2004 and September 2004, far beyond the 90 day time period."*

---

violations of specified statutes." [68 Fed. Reg. 31860, May 28, 2003].

[15] "The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by inserting after the item relating to section 1514 the following new item: **1514A. Civil action to protect against retaliation in fraud cases."** Sarbanes-Oxley Act of 2002 Corporate and Criminal Fraud Accountability Act (CCFA) Public Law 107-204, July 30, 2002, 18 U.S.C. § 1514A(b). "A **person** who alleges discharge or other discrimination by any person in violation of subsection (A) may seek relief under subsection (c) by -- (A) filing a complaint with the Secretary of Labor; or (B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de nova review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy." **18 U.S.C. § 1514A(b).**

"*Accordingly, the Court will dismiss Plaintiff's Ninth Claim.*" (Dism. Order Pg.11 ¶6); 9th Circuit affirmed.

The court has erroneously based the claim accrual period on employment dates,[16] yet the statute states that an "action brought under paragraph (1) shall be commenced not later than 90 days after the date **on which the violation occurs.**" 18 U.S.C. § 1514A(b)(2)(D). "A full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations" must be filed within 90 days after the alleged violation occurs; *i.e.*, when the discriminatory decision has been made and communicated to the employee, 29 C.F.R. § 1980.103(b). Rowland was "a person who allege[d] discharge or other discrimination by any person in violation of subsection (a) "who sought "relief under subsection (c)," [18 U.S.C. § 1514A(b)(1)] "by filing a complaint with the Secretary of Labor" (18 U.S.C. § 1514A(b)(1)(A)) on July 9, 2004, September 2, 2004, and December 3, 2004, within 90 days of the alleged violations. *Appendix*-DOL letters.

When "the Secretary has not issued a final

---

[16] 29 C.F.R. § 1980.101 "**Employee** means an individual presently or formerly working for a company or company representative, and individual applying to work for a company or company representative, or and individual whose employment could be affected by a company or a company representative."
Company representative means any officer, employee, contractor, subcontractor, or agent of a company." [69 F.R. 52113, Aug. 24, 2004].

29 C.F.R. § 1980.101: "**Person** means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any group of persons." 68 Fed. Reg. 31860 (May 28, 2003).

decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de nova review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy." 18 U.S.C. § 1514A(b)(1)(B). The Secretary did not issue a final decision within 180 days and Rowland brought this action in Arizona District Court after speaking with, and e-mailing Lawrence A. Ricci, DOL OSHA Regional Supervisor.

V. RELATIONSHIP OF THE EQUAL PAY ACT/ FAIR LABOR STANDARDS ACT(FLSA/EPA) TO TITLE VII, 29 U.S.C. § 255(a)

The "Portal-to-Portal Act of 1947" provides a statute of limitations for actions seeking back wages owed. 29 U.S.C. § 255. There is a two year statute of limitations "after the cause of action occurred" for an employee to file a complaint in federal or state court. 29 U.S.C. 206(d). However, the Act provides for a three-year statute of limitations where the violations were willful. 29 U.S.C. § 255(a). An "employee" is defined as "**any individual employed by an employer**." 29 U.S.C. § 203(e)(1). An "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

The District Court determined that "*Plaintiff alleges that while on medical leave, she was 'subjected to disparate treatment' when her income was 'instead paid to a male' employee. (FAC ¶99). This does not state a cognizable claim under FLSA. Instead, it appears to be another attempt at a Title VII gender based claim. As discussed above, such a claim is untimely. Accordingly,*

the Court will dismiss Plaintiff's Eighth Claim." (Dism.Order-Pg.10-11,¶5).

Rowland's First Amended Complaint actually states:

> FAC ¶99: "Rowland, *** was at least subjected to disparate treatment, when both PSI and WS withheld from her recurring income, while on medical leave, that she was entitled to receive being a licensed Financial Advisor and had earned the rights to a stream of annual income, from, among other things, the revenue stream of "trailers" paid to Financial Advisors on their previous sale of mutual funds, insurance products, including variable annuities, and "managed money investment products." Rowland's earned income was instead paid to a male Financial Advisor."
>
> FAC ¶98: "incorporates by reference all the proceeding and following paragraphs" which further describe unequal wages paid;
>
> FAC ¶100: "Rowland's commission payout percentage unfairly declined due to the disparate treatment by firm wide managers who withheld income opportunities, so that Rowland's income declined year after year at the Scottsdale branch.

There are no pre-filing requirements for the **October 2004** FLSA/EPA claim filed in federal court, and covers willful violations reaching back three years (**October 2001**); otherwise two years (**October 2002**). 29 U.S.C. §§ 206(d), 255(a).

The anti-retaliation provisions of the FLSA/EPA apply here, because she filed a claim in **February 2003**

while still employed by Prudential Securities for arbitration, and §15(a)(3) of the FLSA provides that it is unlawful for any person "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." ***Brock v. Richardson***, 812 F.2d 121 (3rd.Cir.1987); ***Rea v. Martin Marietta Corp.***, 29 F.3d 1450 (10th.Cir.1994).

Where the jurisdictional prerequisites of both the EPA and title VII are satisfied, any violation of the Equal Pay Act/Fair Labor Standards Act is also is a violation of Title VII. Recovery for the same period of time may be had under both so long as the same individual does not receive duplicative relief for the same wrong. *Argued*: Ap.Br. Pgs. 38-39.

VI. FAMILY MEDICAL LEAVE ACT (FMLA) FORMER EMPLOYEE 29 U.S.C. §2615

A FMLA-protected leave cannot be used as a negative factor in employment decisions and 29 U.S.C. § 2615(a)(1) prohibits the "interference with the exercise of rights" of the statute; 29 C.F.R. 825.220(c). ***Diaz v. Ft. Wayne Foundry Corp.***, 131 F.3d 711, 712 (7th.Cir.1997)(holding that a claim by a former employee that he was denied the use of FMLA leave is a claim of a substantive right, covered under (a)(1)); ***Rankin v. Seagate Techs., Inc.***, 246 F.3d 1145, 1148 (8th.Cir.2001).

The Ninth Circuit affirmed the District Court: "*claims fail against PFI and PI because they have no employment relationship with Plaintiff.* (Dism.Order-

Pg. 12:5-6). "*Plaintiff has no cause of action against those with whom she has not been employed and she alleges that she was employed only by PSI/PEG and WS.*" (*Id.*-Lns.18-20). "As against PEG, *Plaintiff's employment terminated on July 1, 2003 ... The FMLA claims are based on Plaintiff's attempt to return to work at the end of her medical leave, which occurred beginning February 2004 and ultimately ended in her "constructive termination." Plaintiff's claim did not accrue until after her employment ended with PEG. Accordingly, the Court will dismiss Plaintiff's Tenth and Eleventh Claims.*" (Dism.Order-Pg. 12:21-26).

The FMLA prohibits interference with Rowland's employment, or employment she qualified for, after she was approved to take a protected FMLA-leave. Under theories of agency, ownership and control, and former employee coverage, the charged conduct is FMLA prohibited interference with her employment. ***Smith v. Bell South Tele., Inc.*** 273 F. 3d 1303 (11th. Cir.)(prohibits discrimination against former employees who took FMLA leave); ***Barrilleaux v. Thayer Lodging Group, Inc.***, 601 F.2d 601, 1999(E.D. La. 199)(coverage of former employee because her current employer was a successor to her previous employer). 29 C.F.R. § 825.220(b)("Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act.").

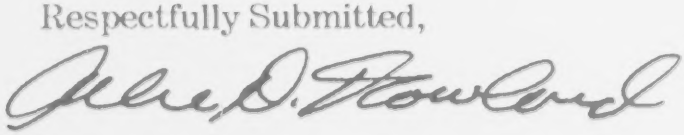
In April 2003, Joe Tierney, Vice President of Prudential Benefits, specifically denied her wages due and said he was aware of her litigation, and continued to withhold her prior earnings data from Prudential Insurance while she was on a Prudential Securities approved FMLA-leave. Dkt.20-¶38; App.Br.Pg.39.

These actions interfered with her attempts to return to work while Prudential Financial retained a 38% ownership in a joint-venture with Wachovia Corporation after transferring her professional licenses to Wachovia Securities. "The sharing of records about a harassment complaint with prospective employers of the complainant constitute unlawful retaliation." "*Wachovia told me when it terminated me that it based its decision on my disability leave of absence....and terminated me three days later...*" after Rowland asked for assistance with "returning to work....February 27, 2004." Dkt.53-Pgs.7-8. In 2004, Prudential Securities' counsel served Rowland's doctors (including her gynecologist) and Prudential Insurance with illegitimate subpoenas for confidential medical information. App.Br.Pgs.29-35. Prudential Insurance released protected medical records to a "**random woman**" and litigation counsel. App.Br.Pg.33.

VII. CONCLUSION

The Supreme Court should grant certiorari to review the Constitutional issues arising here from the Ninth Circuit's errors of law, statutory interpretation, and application of law.

Respectfully Submitted,



Arlene Rowland, Petitioner *Pro Se*
P.O. Box 7591, Ventura, CA 93006
(no telephone, no fax or e-mail)

April 10, 2010